Supreme Court, U.S.
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NO. 98-894

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

LESTER SCOTT,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition For Writ Of Certiorari To The
Ohio Court Of Appeals For The
Seventh Judicial District

REPLY TO STATE'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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First off, it should be understood that in the wake of **Franks v. Delaware, 438 U.S. 154 (1978)**, it seems clear from all the reported Ohio cases that the police-affiants in Ohio are all scrupulously honest. For surely if it were otherwise there would be at least one case that was reversed on the basis that a **Franks** violation was found. *See, e.g.*, **State v. Hunt, 22 Ohio App. 3d 43 (Cuyahoga County, 1984)**, and **State v. Dotson, 43 Ohio App. 2d 31 (Cuyahoga County, 1974)**.

Having said that, in this case counsel-opposite tells us the police conducted "random surveillance" of the premises. This, of course, means we only have the officer's word this happened -- as there was no proof that documents any of these alleged surveillances, a fact noted by the Court of Appeals in its Opinion. (*See*, **Appendix, To The Petition For Writ, at p. A-7.)**

Also, the affidavit for the search warrant, centralized herein, shows considerable reliance was placed by the affiants on what was said to have been "intelligence" that had supposedly been provided them by what was described as the "P.O.S.S.E.". The P.O.S.S.E. was said to be a special unit of police officers (**Brief In Opposition, p. 1**). This too was a reference to rank hearsay that had supposedly been furnished the affiant. Significant here, the original source of this information (if indeed there was a source of this intelligence) was not even slightly verified. Indeed when asked to do so, one of the affiants described what was referred to as intelligence as "information received from a believed to be reliable source". In short, these unknown sources were "believed to be reliable" by the P.O.S.S.E. **(Tr., pp. 57-59).**

As to the equally hollow averment in the affidavit that "two investigating officers met a confidential informant who had provided information in the past that led to two other convictions,"

it should be noted that there was nothing alleged in the affidavit which showed the alleged informant in the asserted conviction did anything other than confirm peripheral facts in those investigations.

Granted, the affiant did allege that there were two (2) drug sales. These assertedly involved an insignificant quantity of drugs (the sale of "one rock of cocaine" on one date and a similar quantity four [4] months later). As to these naked allegations of drug sales, the contention was made in the "Motion to Suppress", and repeated on appeal, that these alleged events never happened. Additionally, two females who supposedly made these sales to the alleged informant both submitted affidavits and testified it never happened. Their testimony was not even slightly challenged. Indeed their testimony was not even slightly impeached.

I

Reply To Respondent's Argument No. 1

As to the State's argument that the affidavit set forth probable cause (**Brief In Opposition, pp., 4-9**), we are first given an unnecessary, rather sophomoric, lecture in which certain vintage Fourth Amendment cases are referenced. In the course of this feeble exercise, ultimately we are told that "a question of fact" to be resolved (**id., p. 8**) existed as to whether the affidavits, plus the sworn denials of the two defense witnesses, were sufficient to prove "the confidential informant lied to the police or that the police officers lied to the court" (**State's Brief, p. 8**). In addressing this narrow issue it seems clear counsel is satisfied with maintaining that in this situation it was enough that the police officer "indicated that the confidential informant did in fact [twice] buy drugs from the two women" (**ibid**).

As to all this, we certainly agree with counsel that deference must be given to the findings made by the trial Court, the finder of

the facts in this instance. But this hardly means the trial Court's decision not to credit unimpeached testimony, and to regard it as perjurious simply because it conflicted with some police officer's opinion (of an event he did not witness) provided a basis to believe whatever was opposite to their testimony. And, that was so because it was enough for him that the police chose to believe what some undisclosed, *paid informant* told them.

II

Reply To Respondent's Argument No. II

Where the proof shows the police not only solicited the alleged informant to make, if he could, an alleged drug purchase, but also paid him, for supposedly having done so, the informant must be regarded as an agent of the police. As we see it the law is clear in this regard, as counsel-opposite fully recognized in her critical references to **United States v. Koening** and **United States v. Radtke**. **(Brief In Opposition, p. 10.)** Granted it is significant in these circumstances whether the alleged informant was acting as an agent of the police. Indeed, on this point we do not dispute counsel's reliance on **United States v. Koenig, 856 F.2d 843 (7th Cir. 1987)**. This case counsel cites for the proposition that a "confidential informant does not automatically obtain and retain an ongoing status as a law enforcement officer or a government agent for **Franks'** purposes by virtue of past assistance to the police" **(Brief In Opposition, p. 10)**. On the other hand, in this case we were not talking about *past assistance*, of the type referred to in **Koenig**, upon which the State relied. **(Ibid.)**

Simply put, in **Koenig** itself, the Court made the huge point of noting that "the government should have been required to prove that Federal Express had no intent to assist in the government's enforcement of the criminal laws to avoid having Federal Express

deemed its agent" (**id., 850**).

Next counsel makes the equally bland argument that Petitioner, Lester Scott, "merely poses the conclusion without factual basis that the confidential informant became a government agent" (**Brief In Opposition, p. 10**). Obviously counsel must have missed the showing made in the petition (**pp. 15 to 19**) and in the Record, that revealed the alleged informant had been solicited and paid (**Tr., pp. 28 & 34**) for his alleged services. In other words, despite the fact of these payments counsel still argues that "Scott merely speculates as to the motivations for the informant's participation in the controlled drug buys" (**Brief In Opposition, p. 11**). Even this is not all. It is also being said that even if the proof showed the alleged informant was a police agent "noticeably absent from ...[our] proof is any demonstration that the information provided by the confidential informant consisted of any lies or falsities" (**id., p. 11**).

The problem with counsel's argument is that she fails to reckon with the indelible fact that the informant in this case was not only paid, his actions were fully orchestrated by the officers (**Tr., pp. 18-19, 28 & 34**). These showings bring what happened here within the analysis made by the Seventh Circuit in **United States v. McAllister, 18 F3d 1412 (7th Cir. 1994)**. This case was relied on by Petitioner (as the appellant) in our Court Of Appeals and was cited by that court in its Opinion, (**Opinion p. A-8**). It is again relied on in our Petition. Yet, it was not even cited by the State in its Brief In Opposition.

Significant here, because it was the precise argument rejected by the Court Of Appeals, is the following argument made to that court in connection with our reliance on **McAllister**. Here it was said:

> This point is magnified by another holding made in **McAllister**, which fits our facts like a glove. Here the Court noted that in making the determination as to whether an informant was acting as a government agent (here as a police-agent), the analysis should include a determination as to "whether the informant performed the conduct at the request of the government [the case here] and whether the government offered him a reward [also the case here]" **(18 F.3d, at pp. 1417-1418).** Also see **United States v. Pritchard, 745 F.2d 1112 (1984).**
>
> Even this is not all. It was also established here that clearly this informant's conduct can be contrasted with that of those informants who assist the police to further their "own interest in hope of increasing his chances of receiving favorable treatment in the handling of his own pending drug charges" **(McAllister, 18 F.3d at p. 1418).** Rather, his purpose was to assist the police, a service he performed for pay. With this being so, the fact that it was shown the informant lied requires that the lies told by him must be imputed to the affiants.

Appellant's Brief, pp. 29-30, filed (below) in the Ohio Court Of Appeals.

Postured then by these various undeniable showings, which provide appropriate and unassailable premises for the contentions made in the above quote, there is really no way this Court should be convinced it is excusable for the Ohio Courts to fail to articulate, in meaningful prose, a resolution of this issue. This is particularly so since the issue was postured for them, as it has been for this

Court, in our Petition, pp. 15 to 17, and in this Reply. On the other hand, what these failures show is that the Ohio Courts continue to exhibit in this case the same type of wrongheadedness that was summarily dealt with in **Smith v. Ohio, 499 U.S. 541 (1990)**.

III

Reply To Respondent's Argument No. III

Counsel's response to our serious accusations, made in our Argument No. III (that the trial court had, *inter alia,* arbitrarily and without any justification rejected the testimony of certain central witnesses), is still another example of a gross failure to identify, and comprehend, an issue and deal with it below its surface. To begin with, no one denies the trial judge, as the first-finder, was empowered to evaluate the credibility of the witnesses. This is so regardless of who presents the witness in support of their respective positions.

However, in this case counsel-opposite truly misses the point when she cast the issue as, in effect, being a swearing contest as between the Petitioner's two witnesses, who swore (both in their affidavits and their testimony) they did not sell drugs (to anyone, including the alleged, arguably phantom informant) *and* the police officer-affiants, who had orally "indicated that the confidential informant did buy drugs from the two women" (**Brief In Opposition, p. 8**).

Here it should be understood, one of the officers fully admitted "the informant did not write out a statement" for them (**Tr., pp. 18-19**). According to this witness, it happened that way because they "did not feel it was necessary," as there was no intent on their part that "he [the alleged informant] was going to give testimony in a courtroom against the individual he made the

purchase from" (**ibid**). As we see it the resolution of this credibility issue against Petitioner is really brought into focus by the above showing. This follows because even if we concede the existence of this alleged informant, and fully credit him with having told the officers he made these isolated purchases, the fact that they believed him can hardly be a sufficient basis for the rejection of sworn, unimpeached testimony.

Obviously then, even if the officers had been lied to by their agent and that lie was merely passed on to the court that issued the warrant, the situation would be no different if the affiants had themselves lied.

With this being so, telling us the trial court chose not to believe the two defense witnesses, and rejected their unimpeached testimony as not being "credible," hardly justifies the further, indeed specious, argument made -- *i.e.*, that the trial judge "issued his decision placing the testimony of the police officers over that of the defense witnesses" (**Brief In Opposition, p. 13**). Having said that, so that there can be no misunderstanding, what we are really being told here is a trial judge is free to reject and disregard testimony that is not even challenged as having been impeached and was not challenged as being perjurious or even implausible. Surely Fourth Amendment issues cannot be so resolved by a state court in such a cavalier fashion.

CONCLUSION

In our judgment given the fact that the officers fully admitted there was no way for them to verify whether their informant had actually purchased any drugs from the people named, and that they "had relied on the informant" (**Tr., pp. 70-71**), it follows that in this case probable cause was predicated on what, at best, must be viewed as an insubstantial basis. While that is bad

enough, the fact that the Courts in Ohio were so obviously willing to look the other way verifies our belief that they are truly convinced that certain people in our inner-cities do not possess any rights the police are bound to respect. *Cf.* **Scott v. Sandford, 60 U.S. 393, 407-408 (1856).**

As we see it, this case fully demonstrates just how far some of our judges are willing to go in these areas where we virtually have a brand of undeclared Martial Law.

Respectfully Submitted,

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